Supreme Court, U.S.
FILED

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JOSPEH ALAN WOODRING, Petitioner

-VS-

THE STATE OF MICHIGAN, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

MICHIGAN SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

QUESTION ONE: Whether the statute under which Defendant was charged and the sentencing guideline statute which added 50 OV points for over 50 grams of aggregate weight of Methadone are unconstitutional because they violate the due process and equal protection guarantees of the 14th Amendment of the United States Constitution, because the classification, prosecution, and increase of sentencing grid and range based upon aggregate weight of a "mixture" is unreasonable, arbitrary and capricious?

QUESTION TWO: Whether the guilty plea was constitutionally defective because the plea was not understanding, voluntary, or accurate based upon (1) the attorney was ineffective for several reasons, especially in allowing a client to plead against his advice when there was evidence of mental illness and the attorney knew that neither the attorney nor the client were ready to make such a decision, (2) the factual basis for the plea did not include facts sufficient to establish all elements of the offense charged (no weight and no drugs), and (3) evidence on the record shows that the defendant did not enter a voluntary and understanding plea, in violation of the 14th Amendment of the United States Constitution?

QUESTION THREE: Whether the trial court erred in sentencing the Defendant to a greater amount of time using the death of Stephen Carlson against him because the death was not connected to the alleged possession of more than 50 grams of Methadone, because it was a denial of fair notice as required by the United States Constitution because the judge used an irrelevant consideration, which was not a part of the record, and did not give the defendant an opportunity to defend against it?

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All parties appear in the caption of the case on the cover page.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below:

OPINIONS BELOW

The order of the Michigan Supreme Court, the highest state court, denying leave to appeal on September 11, 2009, appears at Appendix D to the petition and is unpublished.

The order of the Michigan Court of Appeals denying leave to appeal for lack of merit in the grounds presented, appears at Appendix A and is unpublished.

The Opinion and Order Granting Motion for Ginther Hearing entered on July 11, 2008, in the Muskegon County Circuit Court, which order denies the constitutional issue raised in this Application for Certiorari appears at Appendix B and is unpublished.

The Order Denying Defendant's Motions entered August 21, 2008, in the Muskegon County Circuit Court appears at Appendix C and is unpublished,

The opinion, denying petitioner's motion, entered on the record on August 1, 2008, by Judge Timothy Hicks, in the Muskegon County Circuit Court, appears at Appendix E and is unpublished.

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JURISDICTION

The date on which the highest state court decided my case was September 11, 2009.

A copy of that decision appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining the witnesses in his favor, and to the assistance of counsel for his defense.

United States Constitution, Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MCL 333.7401 – Appendix G

MCL 333.7214 – Appendix G

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STATEMENT OF THE CASE

Petitioner, Joseph Woodring, pled guilty on December 13, 2008, to possession with intent to deliver 50 grams but less than 449 grams of Methadone. He was sentenced on January 11, 2008, to not less than 15 nor more than 40 years, with credit for 148 days, by Muskegon County Circuit Court Judge Timothy G. Hicks. Defendant was represented at the plea and sentence by attorney Frederic F. Balgooyen.

After the conviction and sentence, within 6 months as allowed by MCR 6.310, Defendant filed a Motion for a Ginther Hearing, To set Aside the Guilty Plea, Dismiss Case, and for Re-sentencing. (Appendix K) An evidentiary hearing was held at which Defendant and his trial attorney testified. On August 8, 2008, the trial judge denied the motion. An application for leave to appeal was filed in the Michigan Court of Appeals. The order of the Court of Appeals entered on February 17, 2009 denied the application. It was appealed to the Michigan Supreme Court. The Michigan Supreme Court denied the application on September 11, 2009. (Appendix A & B)

In an Order dated July 11, 2008, following a hearing on July 7, 2008, the trial judge granted the Ginther Hearing and denied parts of the motion, including the claim that the charging and sentencing statutes regarding Methadone were unconstitutional. At the conclusion of the Ginther hearing on August 1, 2008, the judge denied the motion in its entirety in a lengthy opinion placed on the record. (Appendix C, D, and E).

The Defendant was charged, in a related case, Muskegon County Circuit Court case # 07-55669-FH, with delivery of a controlled substance less than 50 grams. In that case, the Defendant delivered to Kristine Westfall 6 wafers of Methadone. Westfall then delivered the wafers to Jay Roest, who, in turn, delivered 2 wafers to Stephen Carlson. Carlson consumed the

Methadone, along with alcohol, and other drugs, including a cough suppressant, dextromethorphan. He died the following morning. Defendant pled guilty on December 13, 2007. The judge sentenced defendant to 34 months to 4 years in prison, which was the maximum allowed under the guidelines. Defendant did not appeal that conviction. (See transcripts of plea, 12-13-07, and TR 8-1-08, pages 30-31)

After filing the first case, the prosecution filed this case against Defendant charging him with possession with intent to deliver 50 grams but less than 449 grams of Methadone.

Frederic Balgooyen, the attorney who represented the defendant at the plea and sentencing, testified at the Ginther Hearing. He stated that he came into the case at the end of November. (TR 8-1-08, page 17). Defendant testified that he first met Mr. Balgooyen at the preliminary examination. Attorney Balgooyen advised him to waive the preliminary examination and he did that. (TR 8-1-08, page 81) The sale of the 6 pills to Kristine Westfall was on August 11, 2008, and defendant had been in jail since August 15, 2007. (TR, plea, 12-15-07, pages 4 and 5). The Cobbs hearing was scheduled for, and held on, December 13, 2007. The guilty plea was entered on December 13. It appears established by these facts that Attorney Balgooyen had been in the case only 15 days at the time of the plea.

There was no laboratory report on any Methadone that the prosecution claimed weighed 50 to 449 grams. Attorney Balgooyen never gave a copy of any such report to the undersigned attorney. (TR 8-1-08, page 20-21) Attorney Balgooyen brought his entire file to the hearing. It contained police reports and copies of search warrant papers but no lab report. He testified that he got some of the papers from prior attorneys on the case and some from Prosecutor Bader, but he could not testify as to what papers he got when and from whom. (TR 8-1-08, pages 21, 23-26) After a period of time going through his file and after some questions and

answers about the papers in the file (TR, 8-1-08, pages 21-28), Attorney Balgooyen was specifically asked "Did he ever receive a lab report identifying and testing 50 grams or more of Methadone?" He answered:

"THE WITNESS: I thought I did. I don't find any in the files. I don't have any specific recollection of seeing such a lab report but I – I don't think it was in the papers that I gave you and I don't think it's in these papers either."

Although the prosecutor (at the Ginther hearing) cross examined Attorney Balgooyen about having no lab report, the prosecutor never produced one. (TR 8-1-08, pages 57-58)

The prosecution was unable to place culpability for Stephen Carlson's death on this defendant. Attorney Balgooyen testified that he had a forensic autopsy report, and that he discussed this with Prosecutor Bader. He testified the criminal culpability could not be placed upon Defendant because of multi factors involved in the death. These multi factors included alcohol, drugs and dextromethorphan, which is a substance used in cough medicine. (TR 8-1-08, pages 30-31) Attorney Balgooyen and Prosecutor Bader agreed that the scoring of 100 point on OV 3 would not be appropriate. (TR 8-1-08, pages 31-35)

Attorney Balgooyen testified that the death of Stephen Carlson was relevant only in the case where 6 pills were sold to Kristine Westfall. He stated "from a strictly legal criminal culpability, I agree with that." (TR 8-1-08, page 38)

Attorney Balgooyen testified that he talked with Defendant about his medical history but that Defendant "wanted to proceed with his plea so quickly there wasn't time to secure medical records. He told me about his medical history. We talked about it and I knew about it." (TR 8-1-08, pages 42-43)

Attorney Balgooyen described the Defendant on the day of the plea. He testified that he discussed the elements with him, that Defendant made his own decisions, that he was showing anxiety, and that Defendant told him:

> "he couldn't stand any more time in jail; that he wanted to get out of jail; that he wanted to get down the road; that he wanted to get on with his life; that he wanted to make this plea as fast as he could; that he wanted to be sentenced as fast as he could. He asked me if he could be sentenced the same day he pleaded guilty." (TR 8-1-08, page 40)

Attorney Balgooyen testified that he knew Defendant had a prescription for Methadone, that Defendant told him he had not received any Methadone while he had been in jail for 5 months. (TR 8-1-08, pages 46-47) Attorney Balgooyen testified that he told the Defendant not to plead guilty. (TR 8-1-08, page 49) Specifically, the witness stated:

> "I told him I hadn't had enough time to look into all the issues. I told him that he was being – he was going through this way too fast and we needed more time to consider what was happening." (TR 8-1-08, page 49)

Attorney Balgooyen testified, regarding the 50 to 449 grams of which Defendant was charged, that he did not have the actual weight of the Methadone, and that he never discussed the weight of the Methadone with the Defendant, and that he never discussed the pure weight of a Methadone wafer (40 milligrams) with the defendant. (TR 8-1-08, pages 48-49, and page 54)

Attorney Balgooyen testified that he did not make a formal request for discovery. (TR 8-1-08, page 68) He testified that the prosecutor never gave him a specific date for the possession of the 50 to 449 grams of Methadone. (TR 8-1-08, page 68) He testified that he never saw any bottle of pills allegedly from Joyce. (TR 8-

EDITORIAL NOTE

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he had seen a tape of his statement and it indicated that he was on drugs, that Attorney Balgooyen never told him that the prosecution would have to prove the crime independent of the statement, and that he talked to the attorney about his own prescriptions because he thought he was being charged with Vicodin, Xanac, and Ritalin. (TR 8-1-08, pages 89-90). Defendant testified the Prosecutor Bader had said at his arraignment on the 50 grams or more (on the jail video tape) that Stephen Carlson had died from cough suppressant and other things mixed up so I was not being charged with the death; therefore, he believed that the death was not going to be held against him. (TR 8-1-08, pages 90-91) He believed if he was not charged with the death, it would not be used against him. (TR 8-1-08, page 93)

Defendant testified that he was on Ritalin all through school for Attention Deficit Disorder, that in August (when he was arrested) he was on Methadone, that he had no Methadone in the jail, that when he went to prison they gave him an x-ray and put him on Methadone. (TR 8-1-08, pages 92-93) He testified that he had withdrawals when the prison officials took him off the Methadone, that he then talked with a psychologist who said he was bipolar and put him on Lithium, Seroquel, and Artane for side effects, and that he feels better now. (TR 8-1-08, page 94). He testified that he feels that the judge's sentence of 15 years is too long. (TR 8-1-08, page 93)

Defendant testified that at the time of the incident in August, he knew that the Methadone wafer was a 40 milligram pill, and that he did not know that there was 1000 milligrams in a gram, that he learned that from me, the undersigned attorney. (TR 8-1-08, pages 95-96) He testified that he was depressed at the time of the plea and sentence. (TR 8-1-08, page 96)

ARGUMENT

QUESTION ONE: Whether the statute under which Defendant was charged and the sentencing guideline statute which added 50 OV points for over 50 grams of aggregate weight of Methadone are unconstitutional because they violate the due process and equal protection guarantees of the 14th Amendment of the United States Constitution, because the classification, prosecution, and increase of sentencing grid and range based upon aggregate weight of a "mixture" is unreasonable, arbitrary and capricious?

1. **The state court in this case decided this important issue of federal law that has not been, but should be, decided and settled, by the United States Supreme Court. And, the state court decision in this case conflicts with the decision in Chapman v United States, 500 US 452; 111 S Ct 1919; 114 L Ed 2d 524 (1991)**

It is clear that this is an important issue that needs to be decided by a federal court, probably by the United States Supreme Court. A habeas request might well be denied on the basis that the constitutionality of statutes in question may not have been decided "by clearly established Federal law as determined by the Supreme Court of the United States."

The only United States Supreme Court case that directly considers aggregate versus pure weight is Chapman v United States, 500 US 452; 111 S Ct 1919; 114 L Ed 2d 524 (1991). This case, however, is not directly on point because the aggregate versus pure weight issue is before the Supreme Court regarding LSD on blotter paper (a method used to illegally distribute LSD) and the federal sentencing statute. LSD on blotter paper for illegal distribution, however, is similar to cuts made to distribute cocaine. The *Chapman* decision noted that Congress wisely punishes possession and sale of other drugs based upon pure weight. The

Michigan statutes make no such distinction. While Methadone is not mentioned in the *Chapman* opinion, Methadone is surely a drug that needs to be controlled based upon pure weight not aggregate weight. It cannot be cut by distributors. Methadone either comes in a pill or in a 40 milligram wafer with an aggregate weight of 6.88 grams.

United States Supreme Court cases discuss the need for a rational basis for a classification to avoid violation of the equal protection clause of the United States Constitution. The statute will be upheld under the rational scrutiny test "if it furthers a legitimate governmental interest and if the classification is rationally related to achieving the interest." Smith v Cahoon, Sheriff, 283 US 553,566; 51 S Ct 582; 75 L Ed 2d 1264 (1931); F S Royster Guano Co v Virginia, 253 US 412,415; 40 S Ct 560; 64 L Ed2d 989 (1920).

In the *Royster Guano Co* case, the statute taxed corporations who did not do business in the state differently than those who did business both in state and out of state, giving a tax preference to those who did not do business in the state. In *Smith v Cahoon*, the statute treated private carriers differently than other types of carriers. In both of these cases, this Court held that the distinction was arbitrary and, therefore, unconstitutional as a violation of equal protection.

Applied to this case, the charging of and the sentencing punishment of a small amount of pure Methadone at the same level as a large amount of other drugs is arbitrary and irrational, and, therefore, a denial of equal protection for the same reasons as stated in both *Smith v Cahoon,* and the *Royster Guano Co* cases.

2. **A state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.**

The only United States Court of Appeals decision on this issue is United States v Henderson, 501 F2d 1180 (2nd Cir 1974); however, that case was considering cocaine and the discussion of the unfairness of laws punishing Methadone as a mixture and based upon aggregate weight was dicta.

The only state decisions that I have found are from inferior state courts, not from a state supreme court. The decisions in New York and Pennsylvania are in direct conflict. In Pennsylvania v Manuel, 2004 PA Super 21 (2004) ruled against the argument presented in this case. In People v Carter, 363 NYS 2d 887; 80 Misc 2d 1081 (1975), the issue was considered and decided on the exact issue here presented. Later New York changed its statute so that Methadone is punished based upon pure not aggregate weight.

No Michigan court has considered the issue with regard to Methadone.

3. The decision of the Michigan courts, on this issue, is contained in a trial court order dated July 11, 2008.

Since the Court of Appeals and Supreme Court denied leave in standard orders without any opinion, other than "lack of merit in the grounds presented," this Court looks to the decision of that last state court to consider the issue. The decision is in a trial court order entered on July 11, 2008, which reads as follows:

"Equal protection, Defendant argues that the punishment of Methadone offenders violates the equal protection guarantees of both the Michigan and US Constitutions. This claim was rejected by Michigan courts in *People v Porterfield,* 128 Mich App 35, 37; 339 NW2d 683 (1983)." (Appendix D)

The question whether the Michigan statutes are unconstitutional as applied to Methadone has not been decided by

Michigan courts. The *Potterfield* case cited by the trial judge is a heroin case, not a Methadone case.

4. Michigan cases on the issue.

In fact other Michigan cases, while not deciding the issue here, because they involve drugs that can be cut for street use, contain statements that tend to support petitioner's argument. In People v Lemble, 103 Mich App 220, 222; 303 NW2d 191 (1981), the Court of Appeals ruled as follows:

"Nor was this defendant denied equal protection of the laws. It is reasonable for the Legislature to impose more severe punishment for these possessing greater amounts of a mixture containing a controlled substance due to the potential for wider dissemination with an increased potential harm to society."

And People v Prediger, 110 Mich App 757, 762; 313 NW2d 103 (1981), followed *Lemble* adding:

"The greater the quantity of the mixture, regardless of the degree of purity, the greater potential harm to society."

This same issue, related to cocaine, was considered by the Court of Appeals in People v Acosta, 153 Mich App 504; 396 NW2d 463 (1986), and again in People v Hamp, 170 Mich App 24; 428 NW2d 16 (1988). In *Acosta*, the Court of Appeals acknowledged that the argument was compelling, as related to cocaine, but that the facts of *Acosta* (and also those in *Hamp*) would not qualify for a consideration of the issue because the defendants in those cases would be guilty under either calculation.

No Michigan Court of Appeals case has decided the issue with regard to Methadone, and no Michigan Supreme Court case has considered the question regarding cocaine or Methadone.

5. MCL 333.7401 and MCL 777.45 are unconstitutional as applied to the drug Methadone

Defendant was prosecuted based upon the law adopted by the legislature and found in MCL 333.7401 (2) (a) (iii). The full text of MCL 333.7401 is attached at Appendix B. Also attached (Appendix B) is MCL 333.7214 which is the statute that includes Methadone as a schedule 2 drug. The issue is whether this statute, MCL 333.7401 (2) (a) (iii) is unconstitutional in a prosecution for possession of Methadone based upon the prosecution's claim that the weight of the drug is that of the "mixture", rather than the pure weight of the Methadone. This is referred to as "aggregate weight." "Pure weight" is the actual weight of the active ingredient. (Statutes attached, Appendix G)

MCL 777.45 is also unconstitutional because MCL 777.45 increases the punishment for possession of over 50 grams through the use of aggregate weight, by adding 50 points in offense variable 15. (Attached, appendix H)

Methadone is a prescription drug that can be dispensed in pills or wafers. A wafer weighs 6.88 gram. Each wafer contains four doses. The pure weight of a wafer is 40 milligrams. It was claimed that defendant possessed 50 wafers, 50 wafers contain only 2 grams of Methadone; the aggregate weight of 50 wafers is 344 grams. Methadone does not come in a mixture. Methadone is not cut as is heroin or cocaine. It can be dispensed in orange juice.

By these statutes, the legislature greatly increases the punishment for possession of over 50 grams through the use of aggregate weight. Through the use of this arbitrary and unconstitutional classification, defendants in Methadone cases are severely adversely affected, and denied equal protection of the law as further discussed in contention 5.

6. The classification as to Methadone in legislation is

arbitrary, capricious, a denial of equal protection.

The aggregate weight standard is arbitrary and capricious. A person with more cocaine in a smaller aggregate mixture is punished less than a person with less cocaine in a larger aggregate mixture. However, the rationale is that the punishment of cocaine and similar street drugs needs to be based upon street weight. This rationale does not apply to Methadone. The statutes treat Methadone the same as other non-prescription drugs, punishing according to aggregate weight. MCL 333.7214 and MCL 333.7401. (Appendix G) A small amount of Methadone cannot be mixed to create a larger quantity for street distribution.

The issue was considered by the appellate courts in New York and then the statute was changed, so that now Methadone is punished according to the "pure weight" not the aggregate weight of the wafer or pill.

In United States v Henderson, 501 F2d 1180 (2nd Cir 1974, while denying the argument as it relates to cocaine and heroin, the judge noted the unfairness of aggregate weight as applied to Methadone. His example is a dose of 2 tablets of Methadone, weighing 80 milligrams, being placed in a two ounce juice mixture. He noted, however, regarding cocaine and heroin, that drugs are "generally marketed in mixtures or compounds;" therefore, he reasoned it "did not seem unreasonable or irrational for a legislature to deal realistically with the marketing of the mixture or compound rather than the handling of the pure narcotic."501 F2d at 1184-1185. See also People v Davis, 408 NYS2d 748 (1978).

In People v Carter, 363 NYS2d 887 (1975), the argument made was accepted by a New York court with regard to 30 milligrams of Methadone in a glass of orange juice. The judge stated:

"I can conceive of no rational basis for a law which treats

> 30 milligrams of therapeutic Methadone (plus a few grains of filler and binder) to which a clinic employee has added an ounce or so of liquid, with the same degree of criminality and sanction as the same weight of more potent, illicit narcotics possessed or sold in dosage quantities at least one hundred times as great."

The Michigan statute specifically uses the term "mixture" stating "of any mixture containing that substance." Methadone is not contained in a mixture. Here Defendant is charged with possession of a pure weight drug. He knew the Methadone wafers were 40 milligrams of Methadone. The size of the pill or the wafer is not determined by the defendant, and there is no way that a Defendant would know the aggregate weight of a wafer. It is determined by the drug company who manufactures the wafers. The size of that wafer is irrelevant to the guilt or innocence of the defendant or to his intent in possessing it. A defendant possessing Methadone has not cut it – he has not created a mixture.

The placement of Methadone in this list with other drugs that can be in a mixture is purely arbitrary. Offenders can be punished in different degrees because of the weight of pills by different manufacturers or because the Methadone is in orange juice. Therefore, the classification fails to include and affect all persons of the same class alike. The statute violates equal protection.

If the Defendant in this case possessed 50 pills, he possessed two grams, not 50 to 449 grams. The point is made clear by comparing the sentence imposed by this judge in the two cases. In the case which is not being appealed, 07-055669-FH, his minimum sentence was the maximum of the guideline range, 34 months. The range was determined on the Sentencing Grid for Class D offenses, 50 prior record points and 15 offense variable points. In this case, 07-055672-FH, the range was 87 months to 217 months from the Sentencing Grid for Class B offenses, 50

prior record points and 60 offense variable points. The difference is 5 points are assessed for the lesser quantity of Methadone and 50 points for the over 50 grams. In both cases the amount of pure Methadone is essentially the same, under 50 grams. Because the aggregate weight used increases the amount so much, the sentence is higher because a B grid is used rather than the D grid. (B and D Grids attached as Appendix I and J)

The statute as applied to Methadone is unconstitutional and we request that the case be dismissed. The Defendant will be serving the 34 month sentence pursuant to the sentence in his related case, and the legislature will be advised to revise the statute so that Methadone can be prosecuted properly upon pure weight.

7. **The right to contest the constitutionality of a statute is not waived by a guilty plea.**

The right to contest the constitutionality of a statute is not waived by a guilty plea. Brady v United States, 397 US 742; 90 S Ct 1463; 25 L Ed 2d 747 (1970); United States v Ury, 106 F2d 28 (CA 2, 1939); Menna v New York, 423 US 61; 96 S Ct 241; 46 L Ed 2d 195 (1975); Tollett v Henderson, 411 US 258; 93 S Ct 1602; 36 L Ed 2d 235 (1973)

QUESTION TWO: Whether the guilty plea was constitutionally defective because the plea was not understanding, voluntary, or accurate based upon (1) the attorney was ineffective for several reasons, especially in allowing a client to plead against his advice when there was evidence of mental illness and the attorney knew that neither the attorney nor the client were ready to make such a decision, (2) the factual basis for the plea did not include facts sufficient to establish all elements of the offense charged (no weight and no drugs), and (3) evidence on the record shows that the defendant did not enter a voluntary and understanding plea, in violation of the 14th Amendment of the United States

Constitution?

1. **The state court in this case decided this important issue of federal law that has not been, but should be, decided and settled, by the United States Supreme Court. And, the state court decision in this case conflicts with the decisions cited herein.**

This question raises several issues, all of which have merit in my opinion; however, my attention is focused upon an issue discussed in a dissent by Justice Marshall, joined by Justice Brennan, in Alvord v Wainwright, 469 US 956; 105 S Ct 355; 83 Led 2d 291 (1984). In that case, Justice Marshall formed the issue in the petition to be "whether an attorney renders ineffective assistance of counsel when he forgoes all investigation and defers to his client's line of defense and defers to his client's wishes on defense strategy . . ."

In this case, I would frame the primary issue to be: whether an attorney renders ineffective assistance of counsel, thereby rendering the plea involuntary, when he allows his client to plead guilty against the attorney's advice when the attorney (1) has been in the case only a short period of time (14 days here), (2) knows he has not completed his investigation into both facts and law, (3) thinks he might want to file a motion to suppress, (4) knows that the client is in an agitated mood so much so that the client wants to plead guilty and be sentenced on the same day, (5) has just participated in a Cobbs meeting wherein the judge has stated that he is unwilling to enter into a sentence commitment, and (6) has no plea or sentencing agreement with the prosecution.

The decision in *Alvord* which denied certiorari, and subsequent cases, hold that an attorney is obligated to follow the decision of the client if the client is competent. I submit that this general law does not decide the issue raised here because the facts suggest that the attorney had reason to suspect the competence of

the defendant. After defendant was incarcerated, he was diagnosed as bi-polar and put on bi-polar medicine. In hindsight, it is clear that his anxiety on the day of the plea taking was likely caused by his having a bi-polar attack.

The other issues raised in this question, whether the factual basis was insufficient because there was no proof of actual drugs, and no proof of the weight of any drugs, and whether the plea was involuntary due to the subsequent diagnosis of a mental condition, bi-polar, are both important, valid, issues.

2. **The issues raised in this application for certiorari were timely raised in the trial court.**

   The Michigan court rules require that a motion to set aside a guilty plea be filed within 6 months after sentencing. It was. See Appendix L for MCR 6.310 (C) and (D) and Appendix K for the trial court motion, affidavit and brief.

3. **The question whether a plea is entered voluntarily is determined by the totality of the circumstances, including ineffective counsel.**

Whether a plea is entered voluntarily is determined by the totality of the circumstances. Brady v United States, supra, and Henderson v Morgan, 426 US 637, 643 n 13; 96 S Ct 2253; 49 L Ed 2d 108 (1076); McCarthy v United States, 394 US 459; 89 S Ct 1166; 22 L Ed 2d 418 (1969); United States v Broce, 488 US 563; 109 S Ct 757; 102 L Ed 2d 927 (1969).

The Sixth Amendment of the United States Constitution (App D) guarantees to the Defendant the effective assistance of counsel. Strickland v Washington, 466 US 668; 103 S Ct 2052; 80 LEd2d 674 (1984)

A claim of ineffective trial counsel generally requires a

showing of both deficient performance and prejudice. The attorney's performance must be below standard such that it is as if the defendant had no attorney at all in violation of the 6th Amendment to the United States Constitution. It must be shown that there is a reasonable possibility that the result of the proceeding would have been different; or, that the representation was so prejudicial that the defendant was deprived of the fundamental right to a fair trial.

Ineffective assistance of counsel renders a plea involuntary and unintelligent. A guilty plea is a serious and sobering occasion because it waives the constitutional right to a jury trial. Dukes v Warden, Connecticut State Prison, 406 US 250; 92 S Ct 1551; 32 L Ed 2d 45 (1972); Duncan v Louisiana, 391 US 145; 88 S Ct 1444; 20 L Ed 2d 491 (1968); United States v Jackson, 390 US 1709; 88 S Ct 1209; 20 L Ed 2d 138 (1968).

Due process requires that a guilty plea, to be valid must be made voluntarily, intelligently, and knowingly. Brady v United States, 397 US 742, 747; (1970); Ebbole v United States, 8 F 3d 530, 533 (7th Cir 1993)

A defendant is entitled to have his counsel investigate, prepare and assert all substantial defenses.' People v Hubbard, 156 Mich App 712, 714; 402 NW2d 79 (1986). 'A substantial defense is one that might have made a difference in the outcome of the trial.' People v Kelly, 186 Mich App 524, 526; 465 NW2d 659 (1990). The failure to conduct a reasonable investigation can constitute ineffective assistance of counsel. See People v McGhee, 268 Mich App 600, 626; 709 NW2d 595 (2005)"

The pre-trial investigation of a case is a constitutional duty to insure that a defendant has effective assistance of counsel. People v Dixon, 263 Mich App 393, 397; 688 NW2d 308 (2004); Mitchell v Mason, 325 F3d 732, 743 (6th Cir 2003); People v Lewis, 64 Mich App 175; 235 NW2d 100 (1975); Beasley v

United States, 491 F2d 687 (6th Cir 1974).

4. **Attorney Balgooyen rendered ineffective assistance of counsel.**

According to law, the error, or errors, must be very serious. They were. The errors must have affected the outcome of the case. They did. The prosecution had no case against the Defendant. They had no drugs that defendant allegedly possessed. They had no laboratory report. They had no weight because they had no drugs. They had no proof of Methadone because they had none to test. The lawyer testified that he was considering a motion to suppress. He had not investigated the defendant's case. He was not ready for his client to plead guilty. As an attorney he had the constitutional duty to refuse to allow the client to plead guilty on December 13, 2007, because, as his attorney, he had the constitutional duty to further investigate the case.

The facts established at the Ginther hearing support our conclusion that Defendant was denied his constitutional right to counsel. Defendant had been in jail since August 15 but this attorney did not come into the case until late November. (according to testimony of Attorney) Defendant testified that he first saw him on November 29, 2007. My first point is that this attorney simply was not ready for a plea so quickly. He should have prevented the plea until he was ready.

The Defendant testified that he did not receive a copy of the police report from Attorney Balgooyen. (TR 8-1-08, pages 83) Attorney Balgooyen testified that he believed that he did take a copy of the report to the jail for the Defendant (TR 8-1-08, pages 39); however, he also testified that he could not "positively state without exception that that's what happened, but that's what I believe happened." (TR 8-1-08, pages 41).

Attorney Balgooyen testified that he talked with Defendant

about his medical history but that Defendant "wanted to proceed with his plea so quickly there wasn't time to secure medical records. He told me about his medical history. We talked about it and I knew about it." (TR 8-1-08, pages 42-43) Defendant testified that the attorney was to bring him a release to get the records. But, again, as with the police report, this indicates more proof of the rushing.

Attorney Balgooyen described the Defendant on the day of the plea. He testified that he discussed the elements with him, that Defendant made his own decisions, that he was showing anxiety, and that Defendant told him:

> "he couldn't stand any more time in jail; that he wanted to get out of jail; that he wanted to get down the road; that he wanted to get on with his life; that he wanted to make this plea as fast as he could; that he wanted to be sentenced as fast as he could. He asked me if he could be sentenced the same day he pleaded guilty." (TR 8-1-08, page 40)

Attorney Balgooyen testified that he knew Defendant had a prescription for Methadone, that Defendant told him he had not received any Methadone while he had been in jail for 5 months. (TR 8-1-08, pages 46-47) Attorney Balgooyen testified that he told the Defendant not to plead guilty. (TR 8-1-08, page 49) Specifically, the witness stated:

> "I told him I hadn't had enough time to look into all the issues. I told him that he was being – he was going through this way too fast and we needed more time to consider what was happening." (TR 8-1-08, page 49)

Defendant testified that Attorney Balgooyen never told him to wait, to not plead guilty. (TR 8-1-08, page 96). Regardless of what the attorney told defendant, it was the lawyer's constitutional duty to refuse to allow the Defendant to plead that day.

Attorney Balgooyen testified, regarding the 50 to 449 grams of which Defendant was charged, that he did not have the actual weight of the Methadone, and that he never discussed the weight of the Methadone with the Defendant, and that he never discussed the pure weight of a Methadone wafer (40 milligrams) with the defendant. (TR 8-1-08, pages 48-49, and page 54) Weight is clearly one of the required elements. It should have been considered by the attorney and discussed with the Defendant.

Attorney Balgooyen testified that he did not make a formal request for discovery. (TR 8-1-08, page 68) He testified that the prosecutor never gave him a specific date for the possession of the 50 to 449 grams of Methadone. (TR 8-1-08, page 68) He testified that he never saw any bottle of pills allegedly from Joyce. (TR 8-1-08, page 70) This is more proof that the attorney was not ready. He had not completed his investigation (as he admits) and he should never have allowed the defendant to plead on the day the judge refused to make a Cobbs commitment.

Attorney Balgooyen testified that he never discussed defending the case based upon the weight of the Methadone. (TR 8-1-08, page 71) He excused this with "I met Mr. Woodring and we entered a plea in just a very short time." He also claimed that the file was large, that "there was a wealth of information to go through and there were other things that could have been requested but it was what it was." (TR 8-1-08, pages 71-72)

On cross examination, Attorney Balgooyen testified that he had never read People v Cobbs but that he does *Cobbs* hearings "all the time." (TR 8-1-08, page 64) He testified that he asked for the *Cobbs* hearing in this case. (TR 8-1-08, page 65) He asked for the hearing too quickly. He needed to work on defenses before he jumped into the Cobbs. Even the judge stated that he was unwilling to do the *Cobbs* because things were "still in too much flux". (See Appendix E, page 9)

The evidence at the Ginther Hearing clearly established that the attorney's performance fell below an objective standard of reasonableness. The deficiency prejudiced the defendant. Particularly because the prosecution had no physical evidence, it is highly likely that the Defendant would have been found not guilty.

5. The trial court denied defendant's motion after holding a Ginther hearing.

The trial granted defendant's motion for a Ginther Hearing. People v Ginther, 390 Mich 436; 212 NW2d 922 (1973). A Ginther hearing is a Michigan evidentiary hearing on the issue of ineffective counsel. It was held on August 1, 2008. Trial counsel, Frederic Balgooyen, and the Defendant testified.

The trial judge's opinion was given orally at the conclusion of the hearing. (Appendix E) Although the judge denied the motion, the judge stated that Mr Balgooyen admitted that he had never read People v Cobbs. This is the Michigan case that allows judges to enter into sentence commitments with defendants. The judge stated that Mr Balgooyen admitted that he did not explain the corpus delicti rule, which simply means that he did not explain to the defendant that the prosecution had to prove their case against him. He admitted that he didn't have a time sheet. He admitted to the absence of a lab report. The judge noted that Mr. Balgooyen testified that Mr. Woodring was in a hurry and wanted to get it done and "that opinion by Mr. Balgooyen is supported by the plea transcript where Joe says let's get it done. " Mr. Balgooyen admitted that 'he didn't get some of his work done because Joe wanted to wrap it up sooner than that. And so the medical records he didn't get them and he didn't file that suppression motion."

6. The plea hearing was defective because there was no proof of a physical drug or its weight.

In Fiore v White, 561 US 225, 148 L Ed 2d 629, 121 S Ct 712 (2001), the Supreme Court ruled that failure to provide any proof on a basic element of a crime in a violation of due process. Michigan law is the same. People v Wolfe, 440 Mich 508, 514; 489 NW2d 748 amended 441 Mich 1201 (1992).

In Bunkley v Florida, 538 US 835, 155 L Ed 2d 1046, 123 S Ct 2020 (2003), the Supreme Court ruled that it was error for a state supreme court to uphold a conviction without deciding whether a pocket knife was a dangerous weapon when an element of the crime, per a state statute, required that the crime was committed with a "dangerous weapon."

In State of Tennessee v Cordell, 604 SW 2d 841 (1980), it was held that it was a violation of due process to convict of hunting when the season was closed and when no proof was submitted that the hunting season was, in fact, closed.

The elements of possession with intent to deliver are:

> "(1). That the Defendant knowingly possessed a controlled substance;
>
> (2) That the Defendant intended to deliver this substance to someone else;
>
> (3) That the substance possessed was Methadone and defendant knew that it was.
>
> (4) That the substance was in a mixture that weighed _____.
>
> (5) That the defendant was not legally authorized to possess this substance.
>
> (6) That the defendant had knowledge that the weight was in excess of 50 grams, if it was, might be an element of possession with intent to deliver."

In People v Mass, 464 Mich 615; 628 NW2d 540 (2001), the Supreme Court of Michigan held that the amount of the

substance is an element of the crime. Clearly this was not established at the plea hearing. When asked about the weight of the drug, the defendant said "yes" as he responded to all question. Defendant could not possibly have known the aggregate weight. Defendant knew that a wafer is 40 milligrams and that is all that he knew. He did not even know the difference between a milligram and a gram.

The judge's opinion was oral and is attached (Appendix E). He addressed the issue regarding the factual basis for the plea twice in his opinion. (Appendix E, page 10 and 15)

The judge never ruled on whether there was a factual basis. The judge appears only to rule that Defendant waived the claim by the guilty plea. The judge himself questioned the prosecutor's use of the term "pills" instead of "grams". The prosecutor offered no proof that 50 pills weigh over 50 grams. That should have alerted the judge, and the defense attorney, that there was something wrong with the plea.

The factual basis for the plea on December 13, 2008, was taken quickly without much effort on the part of the judge or the attorneys. The defendant was not asked to state the facts upon which he believed that he was guilty. Instead he was only asked for questions that called for a "yes" or "no" answer. It was a hurry up and get it over with proceeding that was inherently unreliable. As was established at the evidentiary hearing of the motion, there was no laboratory report on any "over 50 grams of Methadone." It was clear that the attorney had no laboratory report and could not be sure that he had ever seen one. If the prosecutor, then in the court room, had a laboratory report, it would have been simple to produce it and ask Attorney Balgooyen had he ever seen it. Prosecutor Bader, at the plea hearing, asked Defendant about pills from Joyce Kuna (TR 12-13-08, pages 15-16); therefore, we know that it is these pills from Joyce that was the basis of the charge. The prosecutor did not physically have any pills from Joyce. (TR

8-1-08, pages 101, 104, 105) Defendant testified that at the plea, he was just saying "yeah, yeah, yeah", that he was not even thinking. (TR 8-1-08, page 102)

The prosecution had no laboratory analysis, and no aggregate weight. The prosecution had no case against Defendant. The Defendant is innocent; the conviction was a miscarriage of justice. Because the prosecution did not have any drugs seized from Defendant, they could not specify a date, only between dates. Because they did not have any drugs seized from Defendant, they could not specify a place, only Muskegon County

7.The plea was involuntary because of ineffective counsel but also because of the defendant's undiagnosed bi-polar mental condition.

This case involves a claim that the plea was involuntary because the defendant was depressed from a mental condition (bi-polar) at the time of the plea. The facts from the prison health record which the judge had me summarize on the record were accepted by the judge as true. (See Appendix M for these facts and Appendix E, page 15 for the judge's acceptance)

Defendant thought he had attention deficient disorder (ADD). In fact he is bi-polar. This diagnosis was discovered by the medical staff at the Michigan Department of Corrections following his incarceration from this case. He is taking lithium and saroquel. Although Defendant knew that he had been in special education all his school years, he believed he suffered from ADD, and did not know he was bi-polar. Since he has been on medication in prison, his mental health has significantly improved.

This mental illness, along with the ineffective assistance of counsel, had an influence on defendant's plea making it not free and voluntary. His attorney testified that he advised the defendant not to plead guilty that day, but that Defendant was anxious and

insisted. It was the attorney's responsibility to make the decision to wait until the attorney had completed his preliminary work on the case and the Defendant was more relaxed so that his decision could be made in an understanding, free, and voluntary manner, and to consider alternatives based upon competent legal advice.

In conclusion, on question three, there is ineffective counsel, inadequate factual plea, and mental illness. There is prejudice because at a trial the defendant has a significant chance of being found not guilty.

QUESTION THREE: Whether the trial court erred in sentencing the Defendant to a greater amount of time using the death of Stephen Carlson against him because the death was not connected to the alleged possession of more than 50 grams of Methadone, because it was a denial of fair notice as required by the United States Constitution because the judge used an irrelevant consideration, which was not a part of the record, and did not give the defendant an opportunity to defend against it?

1. **The state court in this case decided this important issue of federal law that has not been, but should be, decided and settled, by the United States Supreme Court. And, the state court decision in this case conflicts with the decision in Langford v Idaho, 500 US 110; 111 S Ct 1991; 114 L Ed 2d 173 (1991)**

The prosecution had agreed that the death of Stephen Carlson was not a factor in the charges filed in this case. The judge, however, had a different view of the matter. The judge used that factor to increase defendant's sentence. He did not inform defendant or his counsel that he intended to use that death as an important factor in sentencing.

In Lankford v Idaho, 500 US 110, 114 Led2d 173; 111 S Ct

1723 (1991), the prosecution had agreed not to seek the death penalty. Without informing defense counsel, the judge in that case imposed a death penalty. The United States Supreme Court Justice Stevens stated that the issue being decided "must reflect the importance that we attach to the concept of fair notice as the bedrock of any constitutionally fair procedure," citing Joint Anti-Fascist Refugee Comm. V McGrath, 341 US 123; 71 S Ct 624; 96 L Ed2d 817 (1951). Part of Justice Stevens' quote from the *McGrath case*, is the following statement:

"No better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done." 341 US at 171-172.

Fair notice and a meaningful opportunity to defend is a requirement of due process. While I agree that the secret intent of the judge in *Langford* had greater consequences on that defendant, nevertheless, I submit that the principle and the constitutional violations are the same.

2. **The decision of the trial judge is contained in a transcript of proceedings.**

The judge in imposing the sentence stated:

> "The attorneys have excellently handled the issues here. I endorse the way they have handled the guidelines. But I cannot ignore the fact that in some way you had a role in a chain of events that did, in the end, end up with a young man being dead. And this is the risk I think of just about every drug dealer, that somewhere downstream somebody is going to have his life permanently wrecked by the poison that you injected into the world of addiction. And I think it deserves a substantial prison sentence, and that will be

imposed." (TR, sentence, 1-11-08, page 11)

The judge then sentenced Defendant to 34 months, top of the guidelines in 07-055669-FH, and 15 years to 40 years on this case.

In deciding this part of the motion against the Defendant, the judge stated quite a bit and it is found at pages 140-141 of the judge's opinion. (Appendix E). One part which is very important is as follows:

> "I think Mr. Balgooyen and Mr. Woodring knew about Stephen Carlson's death. I don't think Mr. Balgooyen shirked his responsibility by not telling him something. For one thing he can't be expected to know what's in my head when I make all those sentencing decisions." (TR, sentence, 1-9-08, page 141, Appendix E)

The trial judge tried to distinguish *Langford* by stressing that, in that case, the prosecutor was not even seeking the death penalty. But the same is true here, the prosecutor was not even claiming that the drugs they charged defendant with had anything to do with the death of Stephen Carlson. The trial judge also claimed in his opinion, that he could use anything from his head (such as how you treat your mother and whether you skipped class last year). I disagree. A judge can use anything of record but not things that the judge might know about the defendant outside the record.

A judge may consider matters outside the record in the sentencing provided that it is substantiated by a preponderance of the evidence and the defendant has an opportunity to challenge the information. People v Golba, 272 Mich App 614; 729 NW2d 916 (2007); People v Ratkov (after remand), 201 Mich App 123; 505 NW2d 886 (1986); People v Althoff, 280 Mich App 524 (2008).

3. **Under the facts of this case, and United States constitutional law, the judge was obligated to tell the defendant that he was considering a longer sentence because of the death of Stephen Carlson.**

It was agreed between the defense and the prosecution that the death of Stephen Carlson would not be scored under OV 3. If the death was involved at all, it was only with regard to the charges in the other case, Muskegon file # 055669-FH. In that case Defendant was sentenced at the maximum of the guideline range, 34 months. Kristine Westfall was sentenced to probation and 201 days in jail. Jay Roest received 209 days in jail time. It is unknown what the sentence was for the third defendant. None of these other defendants faced a separate charge as did this Defendant. If the death of Stephen Carlson was such an important factor, why was the treatment of the other defendants so lenient in comparison?

Defendant had no notice that the judge was contemplating a longer sentence on this charge due to the fact that Stephen Carlson died. In fact, when he was arraigned, the prosecutor specifically told him that the death was not caused by the Methadone, and defendant believed that it would not be held against him.

The death of Stephen Carlson had no relevance to the possession of more than 50 grams of Methadone. If the judge was contemplating using that fact against the Defendant, he was obligated to tell him in advance so that the defendant could would have the opportunity to challenge it.

In addition, fair notice is a requirement of due process pursuant to the United States Constitution, 14th Amendment, and the fair notice requirement of the 6th Amendment.The standard for assessing whether there has been a due process violation is set forth in Donnelly v DeChristoforo, 416 US 637; 40 L Ed 2d 431; 94 S Ct 1868 (1974). The Donnelly inquiry is whether the errors

claimed so infected the trial with unfairness so as to make the resulting conviction a denial of due process. In this case the error claimed is the failure of the court to notify the defendant that the death of Steven Carlson would be used against defendant in assessing the penalty.

A person cannot suffer the loss of liberty for a criminal offense without notice and a meaningful opportunity to defend. Jackson v Virginia, 443 US 307, 314; 99 S Ct 278; 61 L Ed 2d 260 (1978).

The fair notice requirement applies to the sentencing phrase of a trial. Lankford v Idaho, supra; Gray v Netherland, 518 US 152; 116 S Ct 2074; 135 L Ed 2d 457 (1996); Gardner v Florida, 430 US 349 (1977). It was unfair to trial counsel to not give this notice, especially when it was agreed by both the prosecutor and defense counsel that the death would not be scored in OV3. In the Lankford Case, the United States Supreme Court stated that "without such notice, the Court is denied the benefit of the adversary process" citing Strickland v Washington, supra. See also BMW of North America v Gore, 517 US 559; 116 S Ct 1589; 134 L Ed 2d 809 (1996)

RELIEF

It is requested that the a writ of certiorari be granted with regard to all three grounds.

DATED: December 10, 2009

Respectfully submitted

Shirley J. Burgoyne

Shirley J. Burgoyne
Attorney for Petitioner

APPENDIX A

Michigan Supreme Court
Lansing, Michigan

ORDER

September 11, 2009

138631

People of the State of Michigan
Plaintiff-Appellee SC: 138631
COA: 289795
v Muskegon CC: 07-055672-FH

JOSEPH ALAN WOODRING

On order of the Court the application for leave to appeal the February 17, 2009, order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 11, 2009

/s Corbin R. Davis
Clerk

APPENDIX B

Court of Appeals, State of Michigan

ORDER

People of MI v Joseph Alan Woodring

Docket No. 289795

LC No. 07-055672-FH

E. Thomas Fitzgerald
Presiding Judge
Mark J. Cavanaugh
Elizabeth L. Gleicher
Judges

The Court orders that the delayed application for leave to appeal is DENIED for lack of merit in the Grounds presented.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on Feb 17, 2009

/s Sandra Schultz Mengel
Chief Clerk

APPENDIX C

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MUSKEGON

THE PEOPLE OF THE STATE OF MICHIGAN
Plaintiff

Vs

HICKS
JOSEPH ALAN WOODRING,
Defendant

File No. 07-55672-FH

Hon. TIMOTHY G.

ORDER DENYING DEFENDANT'S MOTIONS

At a session of said Court, held in the Hall of Justice in the City of Muskegon, County of Muskegon, State of Michigan, this 8/21/08

PRESENT: Honorable TIMOTHY G. HICKS
Circuit Judge

On Defendant's motions to set aside guilty plea, dismiss case, and for resentencing, the Court having entertained the presentations and arguments of counsel, and otherwise being fully informed in the premises,

NOW THEREFORE, IT IS HEREBY ORDERED that, for the reasons stated on the record, Defendant's motions to set aside guilty plea, dismiss case, and for resentencing shall be, and are, DENIED.

/s/_____
Circuit Judge

APPENDIX D

STATE OF MICHIGAN

IN THE 14TH CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN

Hon. TIMOTHY G. HICKS

v

File No. 07-55672-FH

JOSEPH ALAN WOODRING,

Defendant.

OPINION AND ORDER GRANTING MOTION FOR GINTHER HEARING

Defendant files several post-judgment motions. The court heard oral argument on July 7, 2008.

Defendant seeks an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). The trial court does not in every instance have to conduct an evidentiary hearing. It is required only when critical facts are in dispute. *People v Michael Anthony Williams*, 391 Mich 832 (1974). cited in *People v Ford*, 417 Mich 66, 113; 331 NW2d 878 (1982).

The court grants the *Ginther* hearing where critical facts are in dispute, but limits its scope to that. Some of the defendant's claims lack merit, even if there were factual development. Trial counsel cannot be faulted for failing to convince the court to take an erroneous position. *People v Thomas*, 260 Mich App 450,457; 678 NW2d 631 (2004). Further, some of the claims do not rest on factual disputes.

Defendant's double jeopardy argument lacks merit. He relies primarily upon a New Jersey case, *State v Williams,* which was reversed in *State v Ruiz*, 68 NJ 54; 342 A2d 833 (1975). In any event, defendant is not prosecuted here for possession and then delivery of the same substance. In nothing else, he retained 44 of the 50 pills obtained from his supplier. The other three cases he cites simply do not apply to these facts.

Equal protection. Defendant argues that the punishment of methadone offenders violates the equal protection guarantees of both the Michigan and US Constitutions. This claim was rejected by Michigan courts in *People v Porterfield*, 128 Mich App 35, 37; 339 NW2d 683 (1983).

The court schedules a *Ginther* hearing for Friday, August 1, 2008, at 1:30 pm. The defendant is required to be present for this hearing.

IT IS SO ORDERED.

Date; July 11, 2008

/s/_____
Timothy G. Hicks, P35198
Circuit Judge

APPENDIX E

STATE OF MICHIGAN

IN THE 14TH CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN

Hon. TIMOTHY G. HICKS

v

File No. 07-55672-FH

JOSEPH ALAN WOODRING,

Defendant.

Opinion of trial judge place on the record August 1, 2008, pages 127-143:

THE COURT: All right, thank you. These types of motions are very difficult for a bunch of reasons. When you're the moving party like Ms Burgoyne is, it's always a challenge to come back to the Judge who imposed the sentence and to say hey listen, you really made a bunch of mistakes here and you need to do – do it over. And it's a challenger to bring in the attorney who handled the case, in this case Mr. Balgooyen, attorneys are generally smart people and they're well educated and they're trained in the law, and ask questions about the way he did or didn't handle the case previously. I know the family's here and they're very concerned about these things and although there have been occasional moments of, not levity but occasional lighter moments I want all of you to understand that I take these matters very, very seriously.

There are a couple of other preliminary things. I did have my staff pull out Mr. Cline's sentencing sheet and I did look at that. I really can't disclose to all of you what went on there but I remember what the sentence was there.

And as to the prison medical records, Ms Burgoyne the way I's going to handle it, you orally described what's going on there and I am accepting all that today as being true.

How the – the – the further legal background is this. The Rules of Evidence don't apply here under Michigan Rule of Evidence 1101, although pretty much everything we have here today seems to be – to me to be fairly competent and evidence upon which I can rely.

And in terms of the diagnosis by the prison people of Mr. Woodring's medical conditions I think I can conclude that he didn't suddenly become bipolar two weeks before they treated him but probably he was laboring under that type of a condition at the time we handled his events.

Let me start for all of you by talking about the big picture for a minute and then I'll move into the legal analysis. Mr. Woodring and I are not strangers. I remember his case for whole bunches of reasons. I told him one I liked him. I still actually do although I'm sure I'm not big on his list of friends right now. He was at the same high school as a couple of my children at about the same time. To my knowledge they weren't friends but there were a lot of reasons that I remember his cases. And unfortunately he didn't help himself by the way those '04 cases went. I saw him repeatedly for probation violations. Like I said a minute ago I asked my staff to pull one docket sheet in filed 50176. He was in court 13 times. In the other case, file 50175, he was in court 9 times. Now I need to say this: some of those were probably appearances on the cases simultaneously so I'm not saying he was here 22 times but I'm saying he was here at least 13 times and maybe more than that. So I knew back in 2004 about his educational background. I knew about the ADHD. I knew about the spinal problem. I knew about the challenges in school and the special ed services. And in handling his cases I always tried to be mindful of that fact.

Now Mr. Woodring's case was one of four relating to the sale of Methadone that resulted in - that was connected to the death of Stephen Carlson. And I'm intimately familiar with those issues for several reasons. Number one is we have the same issue relating to

OV3 scoring in each one of those cases. We have the same issue almost ever time, so I've got four defense attorneys, four prosecutors; typically Mr. Bader, coming in for Cobbs meetings, coming into court and dealing with these issues. In fact, I still have in my file back there a research file of the research that I did independently about the OV3 issue whether we should score 100 points. I try to be very careful to get all my work on the record but with the Cobbs situation those typically happen in chambers where we can be a little more frank, so some of these things did happen in chambers. But I know this. At one point the prosecutor I think was fairly determined to assess 100 points for OV3 and for a variety of reasons, and some those included me, we ended up concluding that the score of zero was appropriate. Like Mr. Justian said earlier, that's not always a factual admission. Sometimes it's just an admission that it's not worth fighting that battle for a whole bunch of reasons. So I'm familiar with all these issues.

Now the third background place I want to hit is this. I've talked about Mr. Woodring's background with me. I've talked about my background with the three cases of the other individuals involved, Westfall, Cline and Roust and the third place I want to use for background is what Joe told me when I took his plea. I swore him in right here and like I said at that point it wasn't a happy day for him, but he'd been here before. Mr. Balgooyen did invite me to engage in a Cobbs commitment. He worked pretty hard to get me to do that and the prosecutor had some strong feelings about some of these things and the reason I didn't do it in Joe's case is because everything at that point was still to much in flux. I didn't know how OV3 was going to be scored. I wasn't sure how these cases were going to line up with the other individuals and as I probably do once or twice a month I just said no I's I'm just going to do it the old fashioned way. So when we took Mr. Woodring's plea I said, "Mr. Woodring, have you heard Mr. Bader read the charges just now? Do you understand the name and the elements of the charges that you face/ And each time he was "yes" and he was quite respectful about it. I told him, at page 9 of the transcript, "I have made no decisions or commitments

about what your sentence actually will be." I said, "Mr. bader, Mr. Balgooyen and I talked about that in my chambers. Sometimes I do; sometimes I don't. In your case I've decided not to. OK? Do you understand that? "Yes, your honor." And I even told him that "Mr. Balgooyen did try to do that, and he advocated pretty well on your behalf, I will say that". And at the conclusion of the plea taking I said to him. "Do you have any questions about anything that we have done here today?" This is page 16. His answer, "No, your honor". I said "All right. Do you understand the Court has made no promises about what your sentence is going to be" Answer: "Yes". The Court: "All right. You've had a chance to discuss the guidelines with Mr. Balgooyen?" "Yes." "All right, very well." And then Mr. Woodring asked the Court if we could accelerate his sentence date. He wanted an earlier date than the usual three to four weeks and we addressed that on Page 17. So that buttresses Mr. Balgooyen's testimony that it was Mr. Woodring who wanted to get this concluded as quickly as he could.

"What else did he say at the time of his plea? Well, Mr. Justian is right. The Court has to establish that the crime was committed. This Court is not required at the plea-taking to independently weigh evidence, evaluate the evidence, look at it, touch it or feel it. So we're taking the plea in both cases, the delivery involving Carlson and then the possession with intent to deliver relating to the over-50 and here's what he said. And I deferred to Mr. Bader because he was intimately involved with all these things. Mr. Bader says, 'On one occasion during that time did you possess more than 50 grams of the controlled substance Methadone?' 'Yes' Mr. Woodring said. 'Did you intend to deliver all of that 50 grams or more to another person?' Answer 'yes'. 'Did you know it was Methadone?' 'Yes, I did.' And then we had some intervening discussion. Mr. Bader says that he wants to ask another question and he said 'During that time period on one occasion Joyce Acuna actually gave you 50 pills.' Answer, 'Right.' 'And it was your intent to sell those 50 pills,' and he said 'Yes, it was.' And then there was some more discussion and I said

to Mr. Bader, 'You said 50 pills' and then I think we wrapped it up."
(Transcript, August 1, 2008, at page 132).

Now let's talk about some of the legal points. Frankly the court's been generous I think with Mr. Woodring here today because I think Mr. Justian is right on the law. I think by entering a plea Mr. Woodring waived, he gave up many of the claims relating to that plea that he makes here today or all of them. The Michigan case standing for the proposition is People v Bolger at 462 Michigan 495 on Page 519. The Bolger case got reversed late for different reasons on a different ground but Michigan courts have continued to rely on it because it still has continued life for this basis. And the unpublished cases which rely on it in 2005, People v Semkew, S-e-m-k-i-e-w, docket number 255016, People v Veliz, V-e-l-i-z, that's a January 2007 case, docket number 265049. So first Mr. Woodring has waived the claim.

Well he claims listen I can't waive the claim because I received the ineffective assistance of an attorney so if my waiver is based upon ineffective lawyering it really shouldn't be a waiver. I'm not sure that's a prevailing argument but let's consider it. That's one area where I've given some latitude. For a claim of ineffective assistance arising from a plea the Court's primary question is whether his plea was voluntary and understanding. In re: Oakland County Prosecutor, 191 Michigan Appeal 113-120. "The defendant must overcome a strong presumption that counsel provided effective assistance and that counsel's decisions were the result of sound strategy. The question is not whether our court would in retrospect consider counsel's advice to be right or wrong but whether the advice was within the range of competence demanded of attorney in criminal cases.:" there is some dispute between what Mr. Balgooyen said he did and what Mr. Woodring says he did. I tend to believe Mr. Balgooyen where there are disputes for a couple of reasons. One is Joe has admitted quite candidly today that his primary consideration is the length of the sentence imposed. I don't blame him for that. I wouldn't be happy with that either. But that colors everything else. That's the

reason we're here. He's trying for a better deal and I think he's trying to fit some of the facts around that goal.

The other thing that I found troubling was when Joe said a minute ago that he told Mr. Balgooyen something about well I think I ought to do 78 months because I don't have a record. Well when I – the presentence investigation report here that I used when I sentenced him on this file back in January said that he had 2 felonies and 17 misdemeanors. Now I understand that in the community some people slough off some of the misdemeanors, suspended operator' s license and restricted license as not being really crimes. But in my view 2 felonies and 17 misdemeanors is a slight shading of the truth. Some of those involve some elements of dishonesty and although the Rules of Evidence don't apply Michigan Rule of Evidence 609 has some rules they don't apply and I think I can delve into those a little bit. What enhanced Mr. Balgooyen's credibility with me is – is the things he admitted that were against his interest. In other words if he was a liar he wouldn't admit that he'd never read People v Cobbs even though he seeks Cobbs commitments all the time. He would not admit that he did not explain the corpus delicti rule. He wouldn't admit that he didn't have a time sheet. He wouldn't admit to the absence of the lab report. So that makes be believe him when he talks about some of these other things. And so analyzed that way he met with Mr. Bader immediately. He got the reports. He talked with his client, he says three or four times in jail. We could have got the jail log probably to help with that, but we didn't. He met with him other times when he was in court. He said Mr. Woodring was in a hurry and wanted to get it done and that opinion by Mr. Balgooyen, that testimony is supported by the plea transcript where Joe says let's get it done. Mr. Balgooyen ways he watched the video. He admitted that he didn't get some of his work done because Joe wanted to wrap it up sooner than that. And so the medical records he didn't get them and he didn't file that suppression motion.

I will say this. Mr. Balgooyen has been practicing law for a long time. Sometimes when lawyers practice law for a long time they get tired and broken down. Some of us have days probably

where we're tired and broken down, but Mr. Balgooyen litigated this case for Mr. Woodring with passion. He was insistent at the Cobbs time and at the time of the sentence he cared about his client I could tell. He put himself into it. He advocated as well as he could. And some of those decisions about how to approach the Judge are left for him to decide. He's the lawyer, he's got to make those decisions. I was stuck by Ms Burgoyne's questioning of him about well why didn't you say this during elocution or say this. And I've known him for 20 years. He knows what works and what doesn't work. And he has the right to fashion that elocution is a way that makes it more effective. Frankly when attorney go too far off on arguing things that really don't have much merit they start to lose their credibility with me. So Mr. Woodring is entitled to, by the Constitution, the effective assistance of counsel. I think he received same.

Turning the gaze then to the sentencing issue we had a glitch when the probation office apparently did score OV3 and Mr. Balyoogen was on it; he talked to Mr. Bader and they got it eliminated according to their agreement.

I will say this, I think the scoring of the OV 14 is him being a leader is arguable. I think there's arguable merit to that either way but the ineffective assistance of counsel idea doesn't necessarily mean that the attorney has to do everything perfect every time. I'm not sure he got it wrong. I think it's an arguable issue but I think for him to handle it the way he did was not ineffective.

Now let's pursue that. When I prepared for this series of hearings I have on my computer a computer program that I use to calculate what lawyers cal the SIR. And SIR is a Sentencing Information Report and it's the guideline sheet that we use to figure the range. The guidelines range for Mr. Woodring were huge. They were 87 to 217 months and when he talks about proportionality with everybody else, some of them have low guidelines. I think Ms Westfall had 0 to 17 guidelines. So we have to think about that. Mr. Woodring's guidelines were huge. They reflected he's in prior variable – prior record variable E. F is as high as it gets. And that reflects the prior criminal history and

he had a lot of points. Guidelines are like golf, you want a low score; you don't want a high score.

Getting ready for this I had prepared my own sentence guidelines sheet that I had on my own computer. Now when I did that I did not score OV14. I scored it at 0 and as we sentence him it got scored 10 points. The agent recommended 10 points and neither attorney questioned that and so we sentence him with 10 points. Like I said a minute ago it's – it's arguable. But you all need to understand that I understood that. I thought maybe zero was the better score. But even if we had scored it at zero his guideline range remains the same. He's in level E5 with it scored at 10 points and with it being scored at zero he's still at level E5. He's a little closer to one of the borders but he's still at level E5. So even with the scoring being reduced from 10 to 0 the outcome is essentially is the same. He's in the same range and I can tell you now my sentence would be exactly the same.

I face, I will say now that I convinced with the long history that I have with him that this sentence, while big I'll admit it, is deserved
and it will not be affected by any change in the guideline range from this point on. I do believe that this is a fair, valid sentence based upon all the circumstance and I don't expect changing it all even if the guidelines were to shift a little bit.

As to the sentencing issues, here's what the law says: "A reduction of the guidelines number which leaves him in the same cell with the same guidelines will not entitled the defendant to relief". People v Johnson, at 201 Michigan Appeals 281. It's a 1994 case but it was cited in a recent unpublished case, People v Draper. I don't have the – I could find it for you but the Westlaw cite for People v Draper is 57665. It's a 2004 case. "A sentence within the guidelines is presumptively proportional." People v Babcock. This is within the guidelines. I've already said that the guidelines for co-defendants are very different and I really don't think a proportionality argument has any merit on this.

Ms Burgoyne talks a lot about failing to inform Mr. Woodring that the Court was taking the death into account. Well the Court's not obligat3ed to say to the defendant I'm considering these things

in sentencing you: how much you drink and how far you went in school and how you treat your wife and how you treat your mother and whether you skipped class last year, and the Court considers all those things. Now Ms Burgoyne cites a US Supreme Court case, Langford v Ohio a 1991 case and she relies on it. But Langford is different. Langford was a case where the prosecutor was not even seeking the death penalty and the judge imposed in upon the defendant. So the Langford case related to the Court's sentencing options, not to the various factors the Court needs to analyze. The best analogy I can think of would be if the prosecutor said this is an armed robbery and there's a two-year mandatory minimum if there's an assault involved. The prosecutor says we aren't going to claim that the defendant the assault and so if I said guess what, I read the report and I think he did the assault so I'm giving him two years extra even though the prosecutor didn't approve of it. That would be different. That's not what we have here.

And I understand all this. Like I said I was frankly one of the people who said from the beginning that OV3 should not be scored. And here's what I said at sentencing. "But I cannot ignore the fact that in some way you had a role in a chain of events that did in the end end up with a young man being dead. And this is the risk I think of just about every drug dealer that somewhere downstream somebody's going to have his life permanently wrecked by the poison that you injected into the world of addiction." So that's what I said. I think Mr. Balgooyen and Mr. Woodring knew about Stephen Carlson's death. I don't think Mr. Balyoogen shirked his duty at all by not telling him something. For one thing He can't be expected to know what's in my head when I make all these sentencing decisions.

All right. The cases that I cite I think stand for the proposition that many of these sentencing issues were also waived but I's considered them in their substance just to give us a complete record. Give me a minute to check my outline to be sure that I've covered everything please.

I've nor heard anything here today that makes me think that we should revisit the double jeopardy argument or the

constitutionality argument that I've already decided. I think I've already suggested where I'm going on the bipolar. The issue is not whether Joe's bipolar was when he was in front of me. The issue is whether he understands the ramifications and makes a voluntary plea. I'm satisfied that he has. The interest of justice does not suggest to me that we should allow him to set aside his plea here. Clearly his primary interest is getting a lower sentence and the plea-set-aside is secondary to that, not – he doesn't claim I think that that's the primary issue and Ms Burgoyne conceded that in her comments to the Court.

The failure to prove the elements, I've already discussed that. And that's why the waiver issue is so important. When we were here taking Joe's plea if somebody had said wait a minute, there's no proof 50 grams here then I would have looked to the prosecutor and OK what do you have, show me what you have, and we would have solved the problem then. And that's why the waiver doctrine is important. It's not just a lawyer's trick to get out of work. It says look, that is the time for Joe and his attorney to say wait a minute we didn't have 50 grams and we would have fixed it. We would have sorted it out then. And that didn't happen, and that's why the law generally discourages you from coming back later and making the claims like we have.

APPENDIX F

STATE OF MICHIGAN

IN THE 14TH CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN
Hon. TIMOTHY G. HICKS
v
File No. 07-55672-FH
JOSEPH ALAN WOODRING,
Defendant.

JUDGMENT OF SENTENCE
COMMITMENT TO
DEPARTMENT OF CORRECTIONS

1.The defendant was found guilty on 12/13/07 on the crime stated below: Controlled Sub Del 50-449 grams, MCL 333.74012A3, and habitutal offender 3rd con – MCL 769.11. . . .

7. Defendant is sentenced to custody of Michigan Department of Corrections. This sentence shall be executed immediately.

Count 1, sentence date 1/11/2008. 15 years minimum to 40 years maximum, sentence to begin 1/11/2008 credit for 148 days.

. . .

Sentence is concurrent to File 07-55669

1/14/2008 /s/_____
Judge Timothy G. Hicks

Note – this is the pertinent part of a form which cannot be re-typed in its entirety.

APPENDIX G

Michigan Compiled Laws 333.7401 and 333.7214

333.7401 Manufacturing, creating, delivering, or possession with intent to manufacture, create, or deliver controlled substance, prescription from, or counterfeit prescription form; dispensing, prescribed, or administering controlled substance; violations, penalties; consecutive terms; discharge from lifetime probation; "plant" defined.

Section 7401

(1)Except as authorized by this article, a person shall not manufacture, create, deliver, or possess with intent to deliver a controlled substance, a prescription from, or a counterfeit prescription form. A practitioner licenses by the administrator under this article shall not dispense, prescribe, or administer a controlled substance for other than legitimate and professionally recognized therapeutic or scientific purposes or outside the scope of practice of the practitioner, licensee, or applicant.

(2)A person who violates this section as to:

(a)A controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in section 7214(a)(iv) and:

(i)Which is in an amount of 1,000 grams or more of any mixture containing that substance is guilty of a felony punishable by imprisonment for life or any term of years or a fine of not more than $1,000,000.00, or both.

(ii)Which is in an amount of 450 grams or more, but less than 1,000 grams, of any mixture containing that substance is guilty of a felony and punishable by imprisonment for not more than 30 years or a fine of not more than $500,000.00, or both.

(iii) Which is in an amount of 50 grams or more, but less than 450 grams, of any mixture containing that substance is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $250,000.00 or both.

(iv)Which is in an amount less than 50 grams, of any mixture containing that substance is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $25,000.00 or both.

Note – the balance of MCL 333.7401 is not relevant to this case

MCL 333.7214

333.7214 Schedule 2; controlled substance included.

Sec 7214

The following controlled substances are included in schedule 2:

(a)Any of the following substances, except those narcotic drugs listed in other schedules, whether produced directly or indirectly by extraction from substances or vegetable origin, or independently by means of chemical synthesis, or by combination of extraction and chemical synthesis:

(i)Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate excluding nalaxone and its salts, and excluding naltrexone and its salts, but including the following:

Raw opium Etorphine hydrochloride
Opium extracts Hydrocodone
Opium Fluid-extracts Hydromorphone
Powdered opium Metopon
Granulate opium Morphine
Tincture of opium Oxycodone
Codeine Oxymorphone

Ethylmorphine Thebaine

(ii) A salt, compound, derivative, or preparation thereof which is chemically equivalent to or identical with a substance referred to in subdivision (a), except that these substances do not include Isoquinoline alkaloids of opium.

(iii) Opium poppy, poppy straw, and concentrate of poppy straw, the crude extract of poppy straw in either liquid, solid, or powder form, which contains the phenanthrene alkaloids of the opium poppy.

(iv)Coca leaves and any salt,compound, derivative, or preparation thereof which is chemically equivalent to or identical with any of these substances, except that the substances do not include decocainized coca leaves or extraction of coca leaves which extractions do not contain cocaine or ecgonine. The substances include cocaine, its salts, stereoisomers, and salts of stereoisomers when the existence of the salts, steroisomers, and salts of steroisomers is possible within the specific chemical designation.

(b)Any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, when the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation:

Alphaprodine Fentanyl
Anileridine Isomethadone
Bexitramide Levomethorphan
Dihydrocodeine Levorphanol
Diphenozylate Metazocine
Methadone
Methadone-Intermediate, 4-cyano-2dimethylamino-4, 4-diphenylbutane
Moramide-Intermediate, 2-methyl-3-morpholino-1
1-diphenylpropane-carboxylic acid
Pethidine

Pethidine-Intermediate-A, 4-cyano-1-methyl-4-phenylpiperidine
Pethidine-Intermediate-B, 4-ethyl-4-phenylpiperidine-4-carboxylate
Pethidine-Intermediate-C, 1-methyl-4-phenylpiperidine-4-carboxylic acid
Phenazocine Racemethorphan
Piminodine Racemorphan

(c) Unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having potential for abuse associated with a stimulant effect on the nervous system:

(i)Amphetamine, its salts, optical isomers, and salts of its optical isomers.

(ii)Any substance which contains any quantiry of methamphetamine, including its salts, stereoisomers, and salts of steroisomers.

(iii) Phenmetrazine and its salts.

(iv) Methylphenidate and its salts.

(d) Any material, compound, mixture, or preparation, including its salts, isomers, and salts of isomers when the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation as listed in schedule 2, which contains any quantity of the following substances having a potential for abuse associated with the depressant effect on the central nervous system; methaqualone, amobarbital, pentobarbital, or secobarbital; or, any compound, mixture, or preparation containing amobarbital, secobarbital, pentobarbital, or any salt thereof in combination with itself, with another, or with 1 or more controlled substances.

(e) Marihuana, but only for use as provided in sections 7335 and 7336.

APPENDIX H

Michigan Complied Laws 777.45

777.45 Scoring offense variable 15, aggravated controlled substances offenses

Sec 45 (1) Offense variable 15 is aggravated controlled substances offenses. Score offense variable 15 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a)The offense involved the manufacture, creation, delivery, possession, or possession with intent to manufacture, create, or deliver of 1,000 or more grams of any mixture containing a controlled substance classified in schedule 1 or 2 that is a narcotic drug described in section 7214(a)(iv) . . . . . 100 points

(b)The offense involved the manufacture, creation, delivery, possession, or possession with intent to manufacture, create, or deliver of 450 or more but less than 1,000 grams of any mixture containing a controlled substance classified in schedule 1 or 2 that is a narcotic drug described in section 7214(a)(iv) . . . . . 75 points

(c)The offense involved the manufacture, creation, delivery, possession, or possession with intent to manufacture, create, or deliver of 50 or more but less than 450 grams of any mixture containing a controlled substance classified in schedule 1 or 2 that is a narcotic drug described in section 7214(a)(iv) . . . . . 50 points

(d)The offense involved the sale or delivery of a controlled substance other than marihuana or a mixture containing a controlled substance other than marihuana by the offender who 18

years of age or older to a minor who was 3 or more years younger than the offender. 25 points

(e)The offense involved the sale, delivery or possession with intent to sell or deliver 45 kilograms or more of marihuana or 200 or more of marihuana plants . . . . . 10 points

(f) The offense is a violation of section 7401(2)(a)(i) to (iii) pertaining to a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in section 7214(a)(iv) and was committed in a minor's abode, settled home, or domicile, regardless of whether the minor was present . . . . . 10 points

(g) The offense involved the delivery or possession with intent to deliver marihuana or any other controlled substance or a counterfeit controlled substance or possession of controlled substances or counterfeit controlled substances having a value or under such circumstances as to indicate trafficking . . . . . 5 points

(h) The offense was not an offense described in subdivision (a) through (g) . . . . . 0 points

(2) As used in this section:

(a)Deliver" means the actual or constructive transfer of a controlled substance from 1 individual to another regardless of remuneration.

(b) "Minor" means an individual 17 years of age or less.

(c) "Trafficking" means the sale or delivery of controlled substances or counterfeit controlled substances on a continuing basis to 1 or more other individuals for further distribution.

APPENDIX I

Sentencing Grid for Class B Offenses – MCL 777.63

Sentencing Grid for Class B Offenses—MCL 777.63

Includes Ranges Calculated for Habitual Offenders (MCL 777.21(3)(a)–(c))

OV Level	PRV Level												Offender Status
	A 0 Points		B 1-9 Points		C 10-24 Points		D 25-49 Points		E 50-74 Points		F 75+ Points		
I 0-9 Points	0	18*	12	20	24	40	36	60	51	85	72	120	
		22		25		50		75		106		150	HO2
		27		30		60		90		127		180	HO3
		36		40		80		120		170		240	HO4
II 10-24 Points	12	20	15	25	30	50	51	85	72	120	78	130	
		25		31		62		106		150		162	HO2
		30		37		75		127		180		195	HO3
		40		50		100		170		240		260	HO4
III 25-34 Points	15	25	21	35	36	60	57	95	78	130	84	140	
		31		43		75		118		162		175	HO2
		37		52		90		142		195		210	HO3
		50		70		120		190		260		280	HO4
IV 35-49 Points	21	35	24	40	45	75	72	120	84	140	87	145	
		43		50		93		150		175		181	HO2
		52		60		112		180		210		217	HO3
		70		80		150		240		280		290	HO4
V 50-74 Points	24	40	36	60	51	85	78	130	87	145	99	160	
		50		75		106		162		181		209	HO2
		60		90		127		195		217		240	HO3
		80		120		170		260		290		320	HO4
VI 75+ Points	36	60	45	75	57	95	84	140	99	160	117	160	
		75		93		118		175		200		200	HO2
		90		112		142		210		240		240	HO3
		120		150		190		280		320		320	HO4

Intermediate sanction cells are marked by asterisks, straddle cells are shaded, and prison cells are unmarked

The statutory percentage increases for habitual offenders are rounded down to the nearest whole month
The cell range may be less than the maximum possible minimum sentence by a fraction of a month

APPENDIX J

Sentencing Grid for Class D Offenses – MCL 777.65

Sentencing Grid for Class D Offenses—MCL 777.65

Includes Ranges Calculated for Habitual Offenders (MCL 777.21(3)(a)–(c))

OV Level	PRV Level												Offender Status
	A 0 Points		B 1-9 Points		C 10-24 Points		D 25-49 Points		E 50-74 Points		F 75+ Points		
I 0-9 Points	0	6°	0	9°	0	11°	0	17°	5	23	10	23	
		7°		11°		13°		20		28		28	HO2
		9°		13°		16°		25		34		34	HO3
		12°		18°		23		34		46		46	HO4
II 10-24 Points	0	9°	0	11°	0	17°		25	10	23	19	38	
		11°		13°		20		30		28		47	HO2
		13°		16°		24		36		34		57	HO3
		18°		23		33		49		46		76	HO4
III 25-34 Points	0	11°	0	17°	5	23		34	19	38	29	57	
		13°		21		28		42		47		71	HO2
		16°		24		34		51		57		85	HO3
		22		32		46		68		76		114	HO4
IV 35-49 Points	0	17°	5	23	10	30	19	38	29	57	34	67	
		21		28		38		47		71		83	HO2
		25		34		45		57		85		100	HO3
		34		46		60		76		114		134	HO4
V 50-74 Points	5	23	10	32	19	38	29	57	34	67	38	76	
		28		38		47		71		83		95	HO2
		34		45		57		85		100		114	HO3
		46		60		76		114		134		152	HO4
VI 75+ Points	10	28	19	38	29	57	34	67	38	76	43	76	
		34		47		71		83		95		95	HO2
		42		57		85		100		114		114	HO3
		57		76		114		134		152		152	HO4

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APPENDIX K

Motion, Affidavit, and brief filed in trial court

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR COUNTY OF MUSKEGON

PEOPLE

v Case No. 07-55672-FY

JOSEPH ALAN WOODRING, Judge Hicks

Tony Tague (P36226)
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(231) 724-6435

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206 Miller, Ann Arbor, MI 48104
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DEFENDANT'S MOTONS FOR GINTHER HEARING, TO SET ASIDE GUILTY

PLEA, DISMISS CASE, AND FOR RE-SENTENCING

Defendant by Shirley J. Burgoyne, his attorney, moves this court for a Ginther hearing, to set aside guilty plea, dismiss case, and for re-sentencing. In support for these requests, the following statements are made:

A. MOTION FOR GINTHER HEARING

1. The issues raised in this motion were not raised by trial counsel. To correct the errors at the trial level and/ or to raise them in an appeal, a Ginther hearing is necessary.

2. At the Ginther hearing, it will be necessary to inquire into why these issues were not raised, and, into what information and advice was given to the Defendant, both at the guilty plea and at the sentence.
3. As further alleged in this motion, the errors at the trial court level are significant whether or not there was ineffective assistance of trial counsel.

4. Although incomplete until after the Ginther Hearing is held, among the facts that denied Defendant effective trial counsel, at both the plea and the sentence, are the following:

a. There is no discovery request in the file,

b. Although requested, Defendant did not receive a police report until after he was sentenced and he received it from the undersigned attorney.

c. Defendant states that he was told, by his trial attorney, to plead guilty and to answer the questions as he did at the plea hearing. He did not understand the questions. He did not understand what drugs he was charged with. According to the police report, the prosecution has no drugs that they could introduce against the Defendant at the trial, and Defendant did not know this when he entered his plea (because no copy of the police report had been provided to him). The plea was entered on the day of the Cobbs hearing (at which the judge refused to enter into a Cobbs agreement); defendant feels that he was rushed into a plea without a clear understanding; therefore, it was not informed or free and voluntary.

d. Defendant was not given notice that the death of

Steven Carlson could be held against him in either case, but especially in this case. In fact the record makes it clear that no points are accessed on OV3 because the methadone was not either not the cause or not the sole cause of the death. It was unreasonable for the judge to use the death against Defendant to increase the sentence. If the trial lawyer knew that the judge might consider the death against defendant, even though OV3 was scored at zero, he did not inform the Defendant, and he did not object.

e. The attorney had inadequate contact with the defendant visiting him only once or twice at the jail.

f. The attorney apparently failed to research possible defenses.

g. The attorney failed to object to the scoring of the guidelines in OV14 and OV15.

B. MOTION TO DISMISS CASE

1. The conviction is barred by double jeopardy pursuant to United States and Michigan constitutions.

a. The Defendant pled guilty, in this case, to possession with intent to deliver, 50 to 450 grams of methadone contrary to MCL 333.7401 (2)(a)(iii) during the period of time from August 3, 2007, to August 16, 2007.

b. At the same time Defendant pled guilty to delivery of less than 50 grams of methadone on August 11, 2007 contrary to the same statute, MCL 333.7401 (2)(a)(iv), in case # 07-55669-FH.

c. The methodone charged in case # 07-55669-FH was part of the methodone charged in this case.

d. The only difference between the two charges is that the charge in Case #07-55669-FH is a lesser charge included in the higher charge in case #07-55672-FH.

e. Defendant cannot be convicted of two offenses arising out of the same possession.

f. The conviction in this case must be dismissed as constitutionally barred by the doctrine of double jeopardy,

C. MOTION TO SET ASIDE GUILTY PLEA

1. The plea of guilty placed on the record on December 13, 2007, is defective, failing to meet the requirements of MCR 6.302, because there is no proof of all the required elements on the record.

a. The elements of possession with intent to deliver are set forth in CJI2 12.3 as follows:

(1). That the Defendant knowingly possessed a controlled substance;

(2) That the Defendant intended to deliver this substance to someone else.

(3) That the substance possessed was methadone and defendant knew that it was.

(4) That the substance was in a mixture that weighed _____.

(5) That the defendant was not legally authorized to possess this substance.

(6) That the defendant had knowledge that the weight was in excess of 50 grams, if it was, might be an element of possession with intent to deliver.

b. There is nothing on the record showing that there was a mixture containing methadone. No laboratory test was produced.

c. Defendant had a valid prescription for methadone. The prosecution did not establish that Defendant was not legally authorized to possess the drug.

d. There is no evidence on the record of the weight of any drug that the prosecution intended to introduce into evidence, only the number of pills and general weight as alleged in the information is referenced, not the gross weight of the actual mixture allegedly possessed.

e. No specific date is provided. The charge is too vague alleging only between two dates, and no place is provided. The record does not show where it is alleged that Defendant possessed the drug.

f. A prescribed wafer of methadone contains only 40 milligrams of methadone. 50 pills would be well under

50 grams of active ingredient. While the statutory term "mixture" may appropriately apply to other illegal drugs, such as cocaine, it cannot be the same for prescription drugs, especially methadone. The wafers are not a mixture and it is an unconstitutional denial of due process and equal protection to prosecute based upon aggravate weight rather than the known amount of active methadone.

g. Defendant's only knowledge about the weight of the methadone is that a wafer contains 40 milligrams of the substance. Defendant did not know that there are 1000 milligrams in a gram; therefore, 50 pills contain only 2 grams. Any statement on the record contrary to this from the Defendant on the record is incorrect, not free and voluntary.

2. The guilty plea was not free and voluntary because the Defendant was mentally ill, suffering from his bi-polar disease, at the time of the plea.

a. Defendant has been diagnosed as bi-polar since he has been in prison. He is taking lithium and saroquel.

b. Although Defendant knew that he had been in special education all his school years, he believed he suffered from ADD, and did not know he is bi-polar.

c. Since he has been on medication in prison, his mental health has significantly improved.

3. The statutes which establish the law under which the guilty plea was taken, and the guidelines pursuant to which the defendant was sentenced are unconstitutional.

a. The statute treats methadone the same as other non-prescription drugs, punishing according to aggravate weight. MCL 333.7214 and MCL 333.7401.

b. Methadone is a prescription drug which now comes in tablets which may be of different weight depending on the manufacturer. The wafer, with which defendant is charged, contains only 40 milligrams of the substance. The gross weight of a wafer is not known, no evidence having been produced at the plea hearing.

c. If the Defendant possessed 50 pills, he would have possessed 2000 milligrams or 2 grams. To be charged, and sentenced, based upon more than 50 grams is arbitrary and capricious, unconstitutional, and a denial of due process and equal protection of the law.

d. Methadone does not come in a mixture (as does cocaine which can be cut). Some times methadone can be in a glass of orange juice, which would weigh even more than a wafer.

e. This unconstitutional argument relates both to the charging of 50 to 450 grams in the Information, and to the use of that amount in OV 15 to assess 50 points to the offense variable scored.

4. Setting aside of the plea is in the interest of justice.

a. As provided for in MCR 6.310 (B)(1), for reasons stated in this motion, it is in the interest of justice for this guilty plea to be set aside.

b. In addition to the reasons stated above in paragraphs 1,2 and 3, the conviction is barred by double jeopardy as stated in paragraph B.

D. **MOTION FOR RE-SENTENCING**

a. Defendant was denied due process of law and the constitutionally required fair notice because he was not informed that the judge might use the death of Steven Carlson against him at the sentencing. His first notice of this was when the judge pronounced his sentence. Defendant had the right, according to state law, and the 6th and 14th Amendments of the United States Constitutional at sentencing to present evidence why the death should not have been held against him to assess a greater penalty.

b. The judge should not have used the death against defendant in this case because it was not a relevant consideration. The use of such an irrelevant consideration was a denial of due process.

c. The zero points assessed for OV3 was correct. Even if the death could be considered relevant in this case,

OV3 takes full account of that factor and the score is correctly zero. It was a denial of due process and contrary to Michigan law for a judge to use a factor already taken into consideration in the guidelines to increase a sentence.

d. There was no proof either at the plea hearing or at the sentencing that the aggravate weight was 50 grams or more. For the reasons stated hereinbefore, the weight used for 50 pills should be 2 grams; therefore, the proper score was 5 or less, not 50 on OV 15. A change in this scoring significantly reduces the range of the minimum sentence.

e. 10 points should not have been scored on OV 14 because defendant was not a leader in any multiple offender crime. The alleged crime itself was not a multiple offender crime.

f. The sentence was significantly disproportionate, especially since a co-defendant, Kristine Westfall, has now received probation. Although she initiated the transaction with Defendant and delivered the pill to the boys, that factor was not held against her.

This motion is supported by the affidavit of Defendant and the brief filed herewith.

An evidentiary hearing is requested on these motions.

DATED: June 17, 2008

_____

Shirley J. Burgoyne
Attorney for Defendant

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR COUNTY OF MUSKEGON

PEOPLE

v Case No. 07-55672-FY

JOSEPH ALAN WOODRING, Judge Hicks

Tony Tague (P36226)
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Attorney for Defendant
206 Miller, Ann Arbor, MI 48104
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DEFENDANT'S AFFIDAVIT IN SUPPORT OF MOTON FOR GINTHER

HEARING, TO SET ASIDE GUILTY PLEA DISMISS CASE

OR SET CASE FOR TRIAL, AND FOR RE-SENTENCING

STATE OF MICHIGAN)
) ss
County of Muskegon)

Joseph A. Woodring, being first duly sworn, states that the following facts are true to the best of his information, knowledge and belief:

1. To the best of my recollection, I saw Mr Balgooyen once or twice in the jail for a short period of time. I remember asking for a copy of my police report but I never received it. I got one from my new attorney after I was in prison.
2. At the time for the Cobbs hearing, I was in a lock up for several hours. Then Mr. Balgooyen came and told me to plead guilty, that the judge would not commit to anything, and that I would probably get 78 months in prison. I don't remember the attorney saying anything to me about possible defenses or waiting for trial. I felt helpless and depressed and that I had to do what the lawyer told me to do.
3. I was never told that the judge might use the death of Steven Carlson against me to increase my sentence. I did not know that until the sentencing in court, when the judge said that, just prior to giving me the 15 year minimum sentence.
4. Since I have been in prison, I have been diagnosed as bi-polar. I am taking lithium and saroquel. Before coming to prison, I had been diagnosed as ADD. I was in special education all through school but I did not know I was bi-polar. I feel a lot better now. Looking back to the date of the plea, I sincerely believe that I was not mentally with it, that I did not understand what was happening.
5. When I answered "yes" to the question "did I possess 50 grams of methadone" (Transcript page 15), I did not even know what quantity of pills would weigh 50 grams and I did not even know what pills the question referred to.
6. Now, after being on new medication, after reading

the police reports,
and discussing the case with my new attorney, I believe that I do have
defenses to the charge and wish to have the plea of guilty set aside.

/s _____
Joseph A. Woodring

Subscribed and sworn to before on June 17, 2008

/s _____
Shirley J. Burgoyne
Notary Public, Washtenaw County
Acting in Muskegon County

My commissions expires: 10-25-2011

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR COUNTY OF MUSKEGON

PEOPLE

v Case No. 07-55672-FY

JOSEPH ALAN WOODRING, Judge Hicks

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BRIEF IN SUPPORT OF DEFENDANT'S MOTON FOR GINTHER HEARING,

TO SET ASIDE GUILTY PLEA, DISMISS CASE OR SET CASE FOR TRIAL,

AND FOR RE-SENTENCING

A. MOTION FOR GINTHER HEARING

For the defendant to claim ineffective counsel as that may affect the issues to be raised on appeal, the defendant must first request a Ginther heaing. People v Ginther, 390 Mich 436; 212 NW2d 611 (2003).

The Sixth Amendment of the United States Constitution guarantees to the Defendant the effective assistance of counsel in his appeal of right, for, it is held that ineffective counsel is the equivalent of none at all. Strickland v Washington, supra; People v Reed, 449 Mich 375; 535 NW2d 49 (1995).

In this case, Defendant has a fairly large number of issues that need to be raised in the circuit court, and, then, if necessary in an appeal. Many of these issues should have been raised by trial counsel. These issues include the failure of the factual record at the plea hearing to include all the required elements of the offense; the lack of notice at either the plea or sentence hearing that the death of Steven Carlson would, or could, be used as a factor to increase his sentence; the fact that both offenses charge the possession with intent to deliver the same drug and conviction of both is, therefore, barred by double jeopardy; the fact, suggested by the police reports, that the prosecution has no actual physical evidence of any drug to be used against the Defendant at any trial;

and failure to object to the scoring of OV14 and OV15.

In addition there is no discovery request in the file, and, alhough requested, Defendant did not receive a police report until after he was sentenced and he received it from the undersigned attorney.

The Ginther hearing is likely to develop other facts supporting a claim of ineffective trial counsel, including those alleged in the motion, and it should develop facts necessary for other claims made in this motion.

B. MOTION TO DISMISS CASE BASED UPON DOUBLE JEOPARDY

The defendant pled guilty to the delivery of 6 methadone pills to Kristine Westfall and was sentenced to 34 months to 40 years in Case #07-55669-FH. Defendant accepts responsibility for the charge in that case and has decided not to appeal the conviction in case #07-55669-FH.

The 6 pills delivered to Ms Westfall are included in the 50 pills charged in this case as possession with intent to deliver. A conviction in this case is barred by double jeopardy.

It is clear that the legislature in adopting MCL 333.7401 did not intend that a person could be charged with the manufacture, delivery, and intent to deliver, the same substance.

This second conviction is barred by double jeopardy. People v Bobby Smith, 478 Mich 292; 733 NW2d 351 (2007); Blockberger v United States, 284 US 299,304; 52 S Ct 180; 76 L Ed 306 (1932); People v Martin, 398 Mich 303; 247 NW2d 303 (1976).

State v Williams, 129 N J Super 84; 322 A 2d 455 (1974) is a case almost exactly on the facts of this case. The appellate court in New Jersey held that possession of heroin with the intent to deliver was an essential element of the unlawful distribution, must be considered an included offense, and the defendant cannot be convicted of both.

C. MOTION TO SET ASIDE THE GUILTY PLEA

The elements of possession with intent to deliver are set forth in the Motion, paragraph B2. Our first reason to set aside the plea is that all elements of the offense were not established at

the plea hearing. Our second reason is that the Defendant has valid defenses to the charge, including the double jeopardy claim as discussed in contention B above and the unconstitutionality of the statute discussed in contention E .

There is nothing on the record showing the weight of the substance, either the aggravate weight or the weight of the methadone. There is nothing on the record to show what it was that defendant was alleged to have possessed. An examination of the police report shows no exhibit claiming to be methadone. No laboratory report was used at the plea hearing to show that the prosecution had an exhibit that could have been introduced into evidence and that the proposed exhibit had tested positive for methadone. No evidence is introduced showing the Defendant the proposed exhibit (or any lab report) that could establish that he knew what he allegedly possessed was methadone or that he knew the alleged weight. Defendant had a valid prescription for the drug.

In People v Mass, 628 NW2d 540 (2001), the Supreme Court of Michigan held that the amount of the substance is an element of the crime. Clearly this was not established at the plea hearing. That case also held that knowledge of the amount was not an element of a delivery charge but is an element of conspiracy to deliver charge. It is not known from that case whether knowledge of the amount would be required by the Supreme Court as a necessary element of possession with intent to deliver. It would appear that arguments for knowledge being an element in the conspiracy charge might equally apply to intent to deliver. However, Court of Appeals cases have held that knowledge of the amount is not a required element. People v Hamp, 170 Mich App 24; 428 NW2d 16 (1988).

There is no evidence on the record of the weight of any drug that the prosecution intended to introduce into evidence, only the number of pills is referenced, not the gross weight.

No specific date is provided. The charge is too vague alleging only between two dates, and no place is provided. The record does not show were it is alleged that Defendant possessed the drug.

A prescribed wafer of methadone contains only 40 milligrams of methadone. 50 pills would be well under 50 grams of active ingredient. While the statutory term "mixture" may appropriately apply to other illegal drugs, such as cocaine, it cannot be the same for prescription drugs, especially methadone. The wafers are not a mixture and it is an unconstitutional denial of due process and equal protection to prosecute based upon aggravate weight rather than the known amount of active methadone.

Defendant's only knowledge about the weight of the methadone is that a wafer contains 40 milligrams of the substance.

For these reasons and others discussed in this brief, we request that the plea be set aside.

D. THE LACK OF NOTICE THAT THE JUDGE WOULD SENTENCE HIM TO A LONGER SENTENCE BECAUSE OF THE DEATH OF STEVEN CARLSON

This lack of notice is a violation of due process as required by the United StatesConstitution, 14th Amendment, and the fair notice requirement of the 6th Amendment.

The standard for assessing whether there has been a due process violation is set forth in Donnelly v DeChristoforo, 416 US 637; 40 L Ed 2d 431; 94 S Ct 1868 (1974). The Donnelly inquiry is whether the errors claimed so infected the trial with unfairness so as to make the resulting conviction a denial of due process. In this case the error claimed is the failure of the court to notify the defendant that the death of Steven Carlson would be used against him in assessing the penalty so that he could adequately defend himself.

The fundamental right "to be informed of the nature and cause of the accusation" is guaranteed by both the United States Constitution, Amendments VI and XIV, and by the Michigan Constitution, Art I, sec 17.

A person cannot suffer the loss of liberty for a criminal offense without notice and a meaningful opportunity to defend. Jackson v Virginia, 443 US 307, 314; 99 S Ct 278; 61 L Ed 2d 260 (1978).

In Lankford v Idaho, 500 US 110, 114 Led2d 173; 111 S Ct 1723 (1991), United States Supreme Court Justice Stevens stated that the issue being decided "must reflect the importance that we attach to the concept of fair notice as the bedrock of any constitutionally fair procedure," citing Joint Anti-Fascist Refugee Comm. V McGrath, 341 US 123; 71 S Ct 624; 96 L Ed2d 817 (1951). Part of Justice Stevens' quote from the *McGrath case,* is the following statement:

"No better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better was been found for generating the feeling, so important to a popular government, that justice has been done." 341 US at 171-172.

In Hamling et al v United States, 418 US 87, 117-8, 94 S Ct 2887, 41 L Ed 2d 590

(1974), the United States Supreme Court stated:

"'Undoubtedly the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description with which he is charged.' United States v Hess, 124 US 483, 487 (1988)"

In In Re Ruffalo, 390 US 544, 552; 390 S Ct 544; 20 L Ed 2d 117 (1968), the United States Supreme Court held that the "absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." Also, in the *Ruffalo case,* the Supreme Court made the following statement:

"The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh."

The fair notice requirement applies to the sentencing phrase of a trial. Lankford v Idaho, 500 US 110; 111 S Ct 1723; 114 L Ed 2d 173 (1991); Gray v Netherland, 518 US 152; 116 S Ct 2074; 135 L Ed 2d 457 (1996); Gardner v Florida, 430 US 349 (1977). It was unfair to trial counsel to not give this notice, especially when it was agreed by both the prosecutor and defense counsel that the death would not be scored in OV3. In the Lankford Case, the United States Supreme Court stated that "without such notice, the Court is denied the benefit of the adversary process" citing Strickland v Washington, supra. See also

In BMW of North America v Gore, 517 US 559; 116 S Ct 1589; 134 L Ed 2d 809 (1996), the United States Supreme Court stated: "Elementary notions of fairness enshrined in this Court's constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose."

And Michigan law requires notice of facts to be used at sentencing. A trial court may consider facts concerning uncharged offenses at sentencing "providing the defendant is afforded the opportunity to challenge the information and if challenged, it is substantiated by the preponderance of the evidence. People v Golba, 273 Mich App 603; 729 NW2d 916 (2007)

E. The statute is unconstitutional with regard to the offense of delivery or possession with intent to deliver methadone.

This unconstitutional argument relates both to the charging of 50 to 450 grams in the Information, and to the use of that amount in OV 15 to assess 50 points to the offense variable scored.

The argument was made in People v Acosta, 153 Mich App 504; 396 NW2d 463 (1986), and again in People v Hamp, 170 Mich App 24; 428 NW2d 16 (1988). In both cases, the Court of Appeals acknowledged that the argument was compelling but that the facts of Acosta and Hamp would not qualify for a consideration of the issue. The aggravate weight standard is arbitrary and capricious. As stated in the Acosta case, a person with more cocaine in a smaller aggravate mixture (that is stronger drugs)

would be punished less than an person with less cocaine in a larger aggravate mixture.

This cases does qualify for the question left unanswered in *Acosta* and *Hamp*. The application to prescription drugs, especially methadone, even more arbitrary and capricious. The statute treats methadone the same as other non-prescription drugs, punishing according to aggravate weight. MCL 333.7214 and MCL 333.7401.

Methadone is a prescription drug which now comes in tablets which may be of different weight depending on the manufacturer. The wafer, with which defendant is charged, contains only 40 milligrams of the substance. The gross weight of a wafer is not established in this record. If the Defendant possessed 50 pills, he would have possessed 2000 milligrams or 2 grams. To be charged, and sentenced, based upon more than 50 grams is arbitrary and capricious, unconstitutional, and a denial of due process and equal protection of the law. Methadone does not come in a mixture (as does cocaine which can be cut). Some times methadone can be in a glass of orange juice, which would weigh even more than a wafer.

The issue was considered by the appellate courts in New York and then the statute was changed. Now in New York, some substances are punished by aggregate weight and others are not. Methadone is punished according to the "pure weight" of the methadone not the aggregate weight. United States v Henderson, 501 F2d 1180 (2nd Cir 1974); People v Davis, 408 NYS2d 748 (1978). The Henderson case is attached mostly for the paragraph (page 1185) on the extreme inequity in methadone cases.

The classification regarding methadone being punished by the aggregate weight of a mixture is arbitrary and capricious, and, because of that violates equal protection guarantees of the Michigan and United States Constitutions. The offenders can be punished in different degrees because of the weight of pills by different manufacturers or because the methadone is in orange juice. Therefore, the classification fails in include and affect all persons of the same class alike. The statute violates equal protection.

The standard for evaluating an equal protection claim in declaring a statute unconstitutional is set forth in Miller v Department of Revenue, 18 Mich App 145; 171 NW2d 3 (1969).

F. **OTHER SENTENCING ISSUES**

The main sentencing issue supporting the motion for re-sentencing in the lack of notice that the judge had in his mind to use the death of Steven to increase the defendant's sentence is discussed herein in contention 4.

The second sentencing issue is discussed in contention E relating to the unfairness of assessing 50 points for more than 50 grams when the methadone in 50 pills is only 2 grams.

The third is that defendant was not a leader. This was not a multiple offender case. Defendant is charged with possession with intent to deliver. If he did this, he did it alone.

Dated: June 10, 2008

_____

Shirley J. Burgoyne
Attorney for Defendant

APPENDIX L

Michigan Court Rule 6.310 (C) and (D):

"(C) **Motion to Withdraw Plea after Sentence.** The defendant may file a motion to withdraw the plea within 6 months of sentence. Thereafter, the defendant may seek relief only in accordance with the procedure set forth in subchapter 6.500. If the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside, the court must give the advice or make the inquiries necessary to rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea. If the defendant elects to allow the pleas and sentence to stand, the additional advice given and inquires made become part of the plea proceeding for the purposes of further proceedings, including appeals.

(D) **Preservation of issues.** A defendant convicted on the basis of a plea may not raise on appeal any claim of noncompliance with the requirements of the rules of this subchapter, or any other claim that the plea was not an understanding, voluntary, or accurate one, unless the defendant has moved to withdraw the plea in the trial court, raising as a basis for withdrawal the claim sought to be raised on appeal.

APPENDIX M

My statement, on the record, of the relevant part of that exhibit from defendant's prison health records, accepted by the judge as true, was as follows:

"He was diagnosed with this acute or chronic back pain. That's the first two pages here. And the fact that he has spina bifida. And he was put on Methadone. So he was on Methadone for quite some time. Then the records show, the third page here then show that he's – I mean they're talking about poly substance dependence and then the, he's withdrawn. He's withdrawn from the Methadone so the records show this gradual withdrawal. The records then show that he is having a great deal of problems from the withdrawal, so there's a psychological evaluation at, and that's the point where the records then change to investigation of bipolar and to rule out mood disorder or to rule out malingering. As it – as we go through it where I've had it tagged there is a diagnosis which diagnoses him as having bipolar. He's at that point put on bipolar medication and where I've tagged number two show Lithium, which is a bipolar medication and some others. He's now on that and then coming up to the current situation the primary diagnosis is bipolar one disorder, most recent episode depressed moderate." (TR 8-1-08, pages 78-79)